No. 87-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA

Petitioner,

v.

LARRY LEE TAYLOR

Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF

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(Appointed by this Court)
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QUESTION PRESENTED

Did the District Court abuse its discretion in imposing the sanction of dismissal with prejudice?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

STATEMENT OF THE CASE

There are no disputes as to the facts and circumstances leading up to November 19, 1984. On November 19, 1984, Respondent failed to appear before the United States District Court, Western District of Washington, for trial on an indictment for narcotics violations. A bench warrant was issued for Respondent's arrest for his failure to appear. (Joint Appendix p.11)[1] Respondent subsequently pled guilty to the violation of 18 USC § 3146, and was sentenced to the maximum of five years. (J.A. p.29) On February 5, 1985, Respondent was arrested in San Mateo, California, pursuant to both Federal and State bench warrants. (Excerpt of Record, 17,21,50).[2] Respondent was placed in custody at the San Mateo County Jail. Pursuant to a Writ of Habeas Corpus Ad Testificandum, the United States Marshal Service (USMS) transported Respondent to Federal custody in the Northern District of California, on February 7, 1985. (E.R. p.50) The writ was issued because Respondent was needed as a witness in a pending Federal case, *United States* v. *Seigert*, CR. 84-0689. Respondent testified in that case on February 21, 1985, and was held in custody subject to recall in the same trial. The *Seigert* trial ended on February 22, 1985. (E.R. p.51)

Respondent continued to be held in Federal custody despite an order from San Mateo County Judge Pliska issued on February 20, 1985, requiring the presence of Respondent on February 28, 1985. (E.R. p.20) The United States Marshal failed to return Respondent to San Mateo authorities, even though the *Seigert* trial ended on February 22, 1985. The Marshal was aware of its obliga-

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[1] (Hereinafter referred to as J.A.)

[2] (Hereinafter referred to as E.R.)

tion to return Respondent to San Mateo. (E.R. p.50,51) On March 6, 1985, Respondent was brought before the Magistrate of the United States District Court for the Northern District, pursuant to the bench warrant issued by the District Court of the Western District of Washington, for his failure to appear there on November 19, 1984. (E.R. p.52) On April 3, 1985 the Magistrate signed an order directing Respondent's removal to the Western District of Washington forthwith. (E.R. p.52)

On April 8, 1985, Respondent was transferred from the San Francisco County Jail, where he had been held in Federal custody since February 7, 1985, to Sutter County Jail in California. Respondent was held there until April 17, 1985, because the USMS decided to round up several other prisoners for transport to Washington, rather than deliver Respondent directly and forthwith. (E.R. p.53) This delay and others, became the pivotal facts in the District Court's finding of a Speedy Trial violation, and its imposition of dismissal with prejudice. (E.R. p.97-98)

On April 17, 1985, Respondent was transported to a county jail in Oregon. On April 18, 1985, the District Court for the Northern District, issued a second Writ of Habeas Corpus Ad Testificandum for Respondent's attendance at a retrial of the *Seigert* case. Within five days of the court order, a Seattle Deputy Marshal flew Respondent directly to California on April 23, 1985. (E.R. p.53)

Retrial of the *Seigert* case was held on May 7, 1985. From May 6 to May 13 of 1985, Respondent remained in Federal custody at the San Francisco Jail. On May 13, 1985, Respondent was transferred to Sacramento County Jail and on May 17, 1985 to Pierce County Jail in the Western District of Washington. (E.R. p.53)

Respondent subsequently filed a motion to dismiss the indictment for Speedy Trial violations as prescribed by 18

U.S.C. § 3162(a)(2). (J.A. p.23) The District Court granted the motion and dismissed two counts with prejudice. In reaching its decision, the District Court made the following findings. The time from Respondent's failure to appear on November 19, 1984, to February 5, 1985, was excluded under § 3162(h)(3)(A). The Court also excluded the time period from February 6, 1985, until February 22 of 1985, pursuant to the terms § 3161(h). The Court concluded that the period from March 6, 1985, until April 3, 1985, was excludable under the general provision of § 3161(h)(1)(G), in connection with removal proceedings. (Petition For Cert. App. B) The Court found the time from April 4, 1985, until April 13, 1985, was excludable under § 3161(h)(1)(H), for transportation of Respondent to Washington. Finally, the Court determined that the period from April 18, 1985, until May 17, 1985, was excludable under § 3161(h), for proceedings related to the *Seigert* retrial.[3]

The Court then turned to the question of whether the mandatory dismissal should be with or without prejudice. As to the first factor under § 3162(a)(2), the Court found that the narcotics offenses were serious. With regard to the second factor, the Court determined that there was simply no excuse for the delays in light of, "the government's lackadaisical behavior . . ." (Petition for Cert. Appendix B p.30(a). This "lackadaisical behavior," was demonstrated over the entire period from February 7 to April 17, 1985. The USMS did not return Respondent to the San Mateo state authorities until February 28, 1985,

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[3] We point out that Respondent's counsel did not participate in the *Seigert* retrial. Petitioner's assertion that he was "heavily involved in the *Seigert* case, is completely inaccurate. (Petitioner's Brief p. 30 fn#16)

even though the *Seigert* trial ended on February 22nd. Even more egregious was the fact that USMS failed to produce Respondent to the San Mateo authorities, even though on February 20th, the San Mateo County Court issued a direct order requiring the presence of Respondent on February 28, 1985. Moreover, "it took the government six more days to arrange for defendant's, (Respondent's), initial appearance before a magistrate, despite the fact that he had been Federal custody in the district for almost a month." (Ibid). The Court further found that the added delay caused by the USMS assembling other prisoners, along with Respondent, in spite of the Court's order for Respondent's removal forthwith, showed a lack "of concern on the government's part" (Ibid.) The Court indicated that, "the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the Speedy Trial Act." (Ibid) And finally, the District Court addressed the third factor under § 3162(a)(2), and determined that, "the administration of the Speedy Trial Act, and of justice, would be seriously impaired if the Court were not to respond firmly to the instant violation. . . ." (Ibid)

In affirming the decision of the District Court, the Court of Appeal carefully reviewed, de-novo, the findings as to the excludability of the various time periods, and found the District Court's analysis correct as to every period. (Petition for Cert. Appendix A p. 11a - 16a). The Court of Appeal then reviewed the District Court's dismissal with prejudice of the two counts, using an abuse of discretion standard and affirmed that, "under the peculiar circumstances of this case . . . the District Court acted within the bounds of its discretion." (Id. p. 18a).

ARGUMENT

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN IMPOSING THE SANCTION OF DISMISSAL WITH PREJUDICE?

The United States of America, as Petitioner, begins its analysis by offering a balancing test approach in determining whether a dismissal with prejudice is appropriate. Petitioner argues that all of the enumerated factors articulated in 18 U.S.C. § 3162(a)(2) "cut in favor of permitting reprosecution" (Petitioner's Brief (hereafter referred to as P.B.) p.22) Petitioner contends that the District Court abused its discretion under § 3162(a)(2) by entering "a 'with prejudice' dismissal for only one reason: because in the court's view, the government had acted in a 'lackadaisical' manner in arranging for the removal proceedings and Respondent's return to Washington." (P.B. p.15). This assertion misrepresents the basis of the District Court's decision. In its decision of August 1, 1985, the Court carefully considered the three statutory factors:

> "Regarding the *first factor* as applied to the instant case, there is no question that the *drug violations* which the defendant is charged are *serious*. However, the *second factor*, the circumstances of the case leading to the dismissal, tends strongly to support the conclusion that the dismissal must be with prejudice. *There is simply no excuse for the government's* lackadaisical behavior in this case. . .
>
> *Pursuant to the third factor*, the court concludes that the administration of the Speedy Trial Act and of justice would be seriously impaired if the Court were not to respond to the instant violation. If the government's behavior in this case were to be tacitly condoned by dismissing the indictment without prejudice, then the Speedy Trial Act would become a

hollow guarantee." (Emphasis added.) (Petition. for Cert., Appendix B, p. 30a.)

From this decision, it is clear that the District Court considered all three factors, and found that two of them weighed heavily in favor of a dismissal with prejudice. Therefore, Petitioner's assertion that the District Court's decision to dismiss with prejudice was based solely upon a single factor is fundamentally incorrect.

The District Court found that the facts and circumstances that led to the dismissal tended "strongly to support" a dismissal with prejudice. (Ibid). Petitioner, nevertheless, argues that the second factor "strongly favors dismissal without prejudice." (P.B. p.27) It concedes that "[f]or purposes of this case, we do not dispute that the marshal was slower in performing this task than the Speedy Trial Act permits." (Ibid.) Rather, it pursues a line of reasoning that Respondent caused the delay, and as a result, a dismissal with prejudice is unjustified. In particular, Petitioner underscores the fact that Respondent fled the jurisdiction on the scheduled day of trial. This factual observation is beside the point. Congress clearly contemplated the problem of post-indictment fugitives by enacting § 3161 (h)(3)(A) of the Speedy Trial Act.[4] "In an effort to temper the harshness of these relatively short time limits, and to provide the courts with some guidance in distinguishing between 'good' and 'bad' delays, Congress provided a series of exceptions and excludable time periods . . . [one of which was] absence or unavailability of the defendant . . ." 43 *University of Chicago Law Review* 667, 671 (1976) "[T]he language of these provisions is

[4] See Petition for Cert., Appendix B. District Court opinion, p. 29a: "Surely Congress knew . . . that defendants would not conduct their lives so as to enhance the government's convenience."

flexible enough to accommodate almost any form of delay. (*id.*, at 681). By virtue of its broad and precise structure, the Act reaches virtually every phase and circumstance of the criminal trial process. (See generally, Misner, Speedy Trial, Fed. & State Practice (1983).)

In this case, the District Court correctly applied § 3161(h)(3)(A) by excluding the period between Respondent's scheduled trial date and his capture in February. Consequently, the delay caused by Respondent in fleeing Washington to California is simply not relevant to the present analysis. *The only Speedy Trial delays in question are the ones caused by the marshal who was slow in "performing his task."* (Emphasis added.) (P.B. p.27).[5] One cannot argue that the Respondent contributed to the delay in his return to Washington, or the other delays found by the trial court and conceded by Petitioner. However, as the District Court correctly pointed out, there was, "simply no excuse for the government's lackadaisical behavior in this case . . . Instead of responding with dispatch, the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the Speedy Trial Act." (Petition for Cert., Appendix B, p. 30a.) This same concern that marshals were not promptly transporting defendants was voiced in the House debate: *"prisoners aren't moved immediately when ready because marshals try to make their trips worthwhile by combining the movement of several prisoners . . . ."* (Emphasis added.) (Testimony of U.S. Atty Treece, D. Colo., H.R. Rep. No.

[5] This distinction may be explained in terms of causation principles. Respondent's conduct was not a cause, in fact, of the Speedy Trial delays at issue. Petitioner's reliance upon Respondent's flight in its argument merely confuses the analysis.

93-1508, 2d Session., p. 31 (1974); The House Committee made it clear that it could not conclude "that inconvenience to the United States Marshals, or the minimal expense of transporting prisoners is an excuse for delaying the arraignment of a defendant. This provision is not intended to give the attorney for the *government the discretion to extend the time for arraignment beyond ten days where the defendants presence could have been obtained in the exercise of prosecutorial initiative.*" Ibid. (emphasis added). This Congressional intent surely applies where transportation time is specifically limited as in § 3161(h)(1)(H). Therefore, the government exceeded the clearly delineated time limits of the Act solely as a result of its own "lackadaisical conduct." By suggesting that the dismissal with prejudice sanction should not apply to a post-indictment fugitive, the Petitioner, in effect, is arguing for a change in the statute, not for its proper construction.[6]

Petitioner also maintains that the delays "were not attributable to any intentional government misconduct or even negligence that resulted in prejudice to Respondent." (P.B., p.27.) This compound statement confuses the inquiry. First, while the government's delay was not motivated by evil intentions, the District Court found that it was attributable to careless and inexcusable conduct. Petitioner offers no explanation for the series of delays in

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[6] See Court of Appeal's opinion (filed July 13, 1987) discussing proposal and rejection of a bill providing for extension of speedy trial time in cases involving fugitive defendants (Petition for Cert., Appendix A, pp. 7a, 8a, 9a, 10, 11a).

This Court has disapproved of judicial legislation. (*TVA* v. *Hill* (1977) 437 U.S. 153, 194.) "Our individual appraisal of the wisdom or unwisdom of a particular course selected by the Congress is to be put aside in the process of interpreting a statute."

returning the Respondent back to Washington.[7] "Some affirmative justification must be demonstrated to warrant a dismissal without prejudice. "*United States* v. *Russo* 741 F 2d. 1264, 1267 (11th Cir. 1984);.*United States* v. *Caparella* 716 F. 2d 976, 980 (2nd Cir.1983) Instead, Petitioner employs bootstrap reasoning by insisting that the violation of the Act was caused, in large part, by Respondent's flight.[8]

Second, Petitioner argues that no prejudice against Respondent resulted from the government's negligence. Petitioner states on page 21 of its brief:

> "Congress intended that prejudice to the defendant would be one of the factors bearing on whether the dismissal should be with or without prejudice. That much is apparent from the language of § 3162(a)(2), which requires the court to consider the impact of reprosecution on the administration of justice, and it is clear from the House debates, where the sponsors agreed that prejudice to the defendant was a proper factor to consider in deciding whether to bar reprosecution. (P.B. pp.21-22.)

The argument Petitioner attempts to make here is that the language of § 3162(a)(2) embraces prejudice to the defendant as a required factor in the dismissal determina-

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[7] The government was afforded the opportunity to rebut the presumption of an unreasonable delay pursuant to 18 U.S.C. 3161 (h)(1)(H). The government could not meet the burden and therefore, the District Court found that the delay following the 10-day period was unreasonable.

[8] Throughout its brief, Petitioner argues that Respondent should not profit from his own wrongdoing. Petitioner, however, fails to mention that Respondent received a five year sentence for the bail-jump offense. Moreover, the period of time from Respondent's flight to his capture, was excluded. It is hard to see how, in any way, Respondent profited from his flight.

tion. Nowhere does this factor find expression in the language of the statute. Without more, Petitioner cannot persuasively argue that prejudice to the defendant was a central legislative objective behind the dismissal provision. Nevertheless, Petitioner contends, without citation, that this factor is implied in the phrase "impact of the reprosecution on the administration of justice". Petitioner is simply wrong. The point of the Congressional debate over the inclusion of prejudice to the defendant, was in fact, whether it could be included under the *second* factor, (the facts and circumstances leading to the dismissal), not as Petitioner argues, under the third factor, (impact of a reprosecution on the administration of justice and the Act.) In addition to this misreading of the legislative history, Petitioner completely distorts the real result of the debate, namely, that a *requirement* of prejudice to the defendant was undesirable because it would confirm the existing practice, and effectively gut the purpose and effect of the Speedy Trial Act. (A.Partridge, Legislative History of Title 1 of the Speedy Trial Act of 1974 [Federal Judicial Center 1980] pp.220-222)

Petitioner further derives its interpretation of the dismissal section from "the House Debates." But where, as here, a statute speaks in clear and simple language, resort to legislative history is unnecessary. *Reagan, Secretary of the Treasury* v. *Wald* (1983) 468 U.S. 222; *United States* v. *Public Utilities Commission* (1947) 330 U.S. 295. But even if we turn to legislative history for interpretive aid, we find that both the House and the Senate expressed disapproval "with the speed in which criminal cases were being processed." *Misner,* Act of 1974, p. 299. In fact, "(t)he Speedy Trial Act was enacted in part out of dissatisfaction with Sixth Amendment Speedy Trial Jurisprudence, and to put more life into defendants' Speedy Trial

Rights." *United States* v. *Nance* 666 F 2d 353 (9th Cir.1982). Sam Irwin, the senator who introduced the bill, stated, "there is no question in my mind that speedy trial will never be a reality until Congress makes clear to all that it will no longer tolerate delay . . ." (Misner, *supra*, 299.)

In addition we point out that in Colloquy, at the 1974 House Floor Debate 120 Congress Rec. 41777-78 and 41794-95, the following discussions illustrate how § 3162(a)(2), was adopted by floor amendment as a compromise between the sponsors of the Speedy Trial Act and the Department of Justice.

> [Mr. Cohen] "The amendment I intended to offer later this morning will, I believe, remove any serious objection to this Act by leaving dismissal with or without prejudice up the the Court. . ."
>
> [Mr. Dennis] "As I understand the thrust of the [amendment][9] rather than making the dismissal, when the time limits are exceeded, with prejudice so that no prosecution can be brought up again, this will make that question discretionary also with the Court, as to whether he dismisses with or without prejudice. (A. Partridge, p. 218)

Mr. Cohen agreed and then listed the main factors which the Court should consider: "the gravity or seriousness of the offense, the reason why the case could not be prosecuted within the time limitation, and third, whether the ends of justice are, in fact, being served by dismissing with prejudice. (Id at p. 218)

Mr. Dennis was of the opinion that the Court should consider the degree of prejudice to the Defendant's ability to prepare his case. Mr. Cohen, in response, stated:

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[9] The text reads [argument]; the footnote indicates that in the original it probably should be *amendment*.

> "I have to disagree with the Department of Justice in that regard. They simply would confirm the existing practice—that he would have the normal time granted and then there would be dismissal, whether this was due to laziness of the prosecutor or whatever, then they would start all over again. That frustrates the purpose of this Act. We are trying to put some sanctions in to try to discipline our judicial system, the court, the prosecutor and the defense counsel, and there are reasonable exclusions that take into account a variety of factors and give the courts some flexibility." (Id at p. 218)

Mr. Cohen cited to the opinions of his peers highly respected in the legal community, regarding the sanction provision of the 1974 Speedy Trial Act, H.R. 17409:

> "Judge Zirpoli, who testified before our committee, although he did not favor the particular measure, did support the dismissal with prejudice.[10]
>
> 'Personally, I would be disposed to accept the view of . . . and I want to make one comment about that, very serious comment. I would be disposed to accept the view of the American Bar. Someone said, well, with rule 50(b), they didn't put those sanctions in effect. Senator Ervin couldn't get those sanctions in effect right away. We had to grapple with the Federal judiciary, we had to grapple with the Department of Justice, but we might get those sanctions included. But you couldn't get them in on the first year or the second year of operation of the plan, just as Senator Ervin couldn't get them in, and there is no reason why, given a little more history, the benefit of experience, we couldn't get them in.' [Hearings, p. 382]. Id

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[10] "Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli endorsed the ABA position and offered some valuable insight into the realities of the legislative process now underway"

> at p. 214 quote from 1974 House Committee Report 36-38.
>
> U.S. District Judge Feikens from Michigan supported it. And as I look back through the report filed with the House, I would refer the attention of the Members to page 20, where Justice Rehnquist, then Assistant Attorney General, said the following:"
>
> "Therefore, we are unwilling to categorically oppose the mandatory provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of the neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill."

In the interest of having the Act signed into law, Mr. Cohen offered the present language of § 3162(a)(2) as a compromise, thereby eliminating the objection of the Department of Justice. (Id at p.219). Nevertheless, Mr. Dennis continued to press for his proposal that a prerequisite finding of prejudice to the Defendant be made a part of the dismissal sanction. He stated that if it was not written into Mr. Cohen's compromise amendment he wanted to state that it was important for the judge to consider, thus making it a part of legislative history. After Mr. Dennis prodded Mr. Cohen to accede, Mr. Cohen responded:

> "What I am indicating is that we not consider it as a separate independent ground for the prosecution and open up to the Justice Department and the Prosecutor to say we have not met the time limit and we did not take advantage of all other time exemptions, but there is no prejudice to the defendant. I do not think that would be a sufficient basis in the considera-

> tion of the other factors to determine if justice could be done. (Id. at p.219)

Apparently, not satisfied with Mr. Cohen's remark, Mr. Dennis proceeded to ask the author of the bill, Congressman Conyers, his opinion. Mr. Conyers answered:

> "This fact and circumstances of the case could include the degree to which the defendant might have been prejudiced. This does not alter, I say to my friend, the gentleman from Indiana (Mr. Dennis) the fact that the expiration of the time limits subject to these conditions are a condition in and of themselves for a dismissal. (Id. at p.222)

To appreciate the purpose and intended effect of § 3162(a)(2), one must carefully contrast the distinguishing features of the statutory standard of dismissal from those of its constitutional counterpart. The existing constitutional standard under *Barker* v. *Wingo* (1972) 407 U.S. 514, 531-33 provides, as two of its factors, prejudice to the defendant and length of delay. Section 3162 (a)(2) does not. These omissions are perhaps the most remarkable and telling aspect of the dismissal provision. By clear implication, Congress expressed its intent to remove these factors as *required* considerations in the statutory dismissal analysis. (*Passenger Corp* v. *Passenger Assn.* (1973) 414 U.S. 453, 458, applying the canon of statutory construction expressio unius est exclusio alterius.).[11] (See in accord, *Fedorendko* v. *United States* (1980) 449 U.S.

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[11] The Petitioner's interpretation of the provision, in effect, is a mere codification of the constitutional standard. If length of delay and prejudice to defendant are to be considered required factors in the statutory dismissal analysis, they must be found within four corners of the Act. Furthermore, ". . . the House debates indicate that the prejudice factor is neither a necessary or sufficient consideration." (43 U. Chicago L. Rev. 667, 706, fn. 190.)

490, 512; *United States* v. *MacCollum* (1975) 426 U.S. 317, 321.) This underlying motive was explained in the House Report:

> The Committee finds that the adoption of speedy trial legislation is necessary in order to give real meaning to the Sixth Amendment right. Thus far, neither the decisions of the Supreme Court nor the implementation of Rule 50(b) of the Federal Rules of Criminal Procedure, concerning plans for achieving the prompt disposition of criminal cases, provides the courts with adequate guidance on this question.
>
> The Supreme Court has held that the right to a speedy trial is relative and depends upon a number of factors. A delay of one year in some instances had been interpreted as prima facie evidence of a denial of the right. However, in others, a delay of up to eighteen years has been held not to violate the Sixth Amendment. In its 1972 decision, *Barker* v. *Wingo*, 407 U.S. 514, the Court stressed four factors in determining whether a speedy trial had been denied to a defendant: length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. The task of balancing these factors and arriving at a conclusion which is fair in all cases is difficult. *It provides no guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay.*
>
> With respect to providing time periods in which a defendant must be brought to trial, the Court in *Barker* admitted that such a ruling would have the virtue of clarifying when the right is infringed and simplifying the courts' application of it. However, the Court said: But such a result would require this Court to engage in legislative rule-making activity, rather than in the adjudicative process to which we should confine our efforts. Id at 523." (Emphasis added). (Misner, *supra*, p.305)

Apart from the fact that § 3162(a)(2) omits the aforementioned factors required under the Constitutional standard, the statute is different in other respects. First, the statute places mandatory procedural requirements on the defendant not imposed under the constitutional standard. For example, the defendant may waive the remedy of a Speedy Trial Act violation-not so under *Barker* v. *Wingo* (supra 407 U.S. at 528). Second, under *Barker* v. *Wingo*, this Court stressed flexibility over precision in measuring the time periods applicable to the Sixth Amendment Right to a Speedy Trial. (Id at 529). In contrast, the time limitations set forth in the Act are precise and mandatory. Third, once a District Court finds a Sixth Amendment violation it is required to dismiss with prejudice. On the other hand, a court, following a finding of a Speedy Trial Act violation, has the discretion to impose a dismissal either with or without prejudice. All of these differences strongly indicate that the statutory analysis was to be quite different from and independent of its constitutional corollary. By introducing the length of delay and prejudice to the defendant factors into the present analysis, Petitioner is attempting to engraft principles applicable under the Sixth Amendment standard onto the statute.

Moreover, it is important to realize that the Speedy Trial Act was enacted to improve the then-existing system. "Remedial statutes are liberally construed to suppress the evil and advance the remedy." (Sutherland, Stat. Const. (1984), § 60.01 p. 29.) Therefore, the differences found in the Speedy Trial Act which clearly set it apart from its constitutional counterpart should be given full effect to advance the remedy contemplated by Congress.

Petitioner's reading of § 3162(a)(2) is problematic for yet another reason. It suggests that a trial court, in its proper

exercise of discretion, is required to balance prejudice to the defendant and the length of the delay against the enumerated factors of the dismissal provision of the Speedy Trial Act. Such an approach creates serious practical problems. Petitioner is suggesting that a District Court should be expected to know and apply a factor that is not even contained in the very language of the provision.[12]

Central to the Petitioner's argument is the fact that the government exceeded the time limits of the Act by only fourteen days, and therefore such a minor violation does not justify a dismissal with prejudice. As discussed, Congress decided not to make the length of delay part of the language or application of the Act. By excluding this factor, Congress implied that, just like prejudice to defendant, it was not a *required* consideration in the dismissal analysis. Moreover, Petitioner's position ignores the basic premise that "the Act's purpose was to fix specific and arbitrary time limits within which various stages of a criminal prosecution must occur." (*United States* v. *Caparella*, *supra* 716 F. 2d 976). "That Congress enacted the Speedy Trial Act of 1974, designed to establish spe-

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[12] In the case at bar, the District Court carefully looked at the "plain language of the Speedy Trial Act", in passing on the dismissal issue. (Petition for Cert., Appendix B, p.30a.) While there are limits to a trial court's discretion, here, it was not abused but rather properly and carefully exercised. (*Albermarle Paper Co.* v. *Moody* (1975) 422 U.S. 405, 416.) Even if we assume for the purpose of this discussion that both length of delay and prejudice to defendant may be considered in the dismissal analysis, this does not mean that they are requirements. Put simply, it may be permissible for a district court to consider them, but it is by no means compelled to do so. A district court certainly does not abuse its discretion by concluding that, under the peculiar facts before it, consideration of them is unnecessary.

cific [and absolute] time limitations between a criminal suspect's arrest and trial . . . ." is apparent from its clear and exacting language. (10 Seton Hall Law Review 539, 553.[1980]) In short, a line must be drawn that applies in all cases.

In the case at bar, the government was fully aware of the time limitations of the Act, yet it disregarded its mandate and failed to prevent a violation of the Act's time limits. As the District Court pointed out, the government was responsible for several inexcusable delays throughout the period from February 5 to April 17, 1985. Respondent was held in Federal custody after the *Seigert* trial ended on February 22, 1985, notwithstanding the fact that an order issued from the San Mateo County Judge on February 20, 1985, requiring the presence of Respondent on February 28, 1985.[13] "It also took the government six more days to arrange for Respondent's initial appearance before a magistrate despite the fact that he had been in Federal custody in the district for almost a month." (Pet. Cert. App. B p.30a). And finally, the government failed to transport Respondent to Washington in a reasonable amount of time. In light of these inexcusable delays, the government is not just guilty of a "minor violation," but of an intentional disregard of its responsibility to effectuate the Act.

Petitioner relies heavily upon the legislative history to support its position that:

> "First, the dismissal-without-prejudice option is a central feature of the Speedy Trial Act . . .; Second, . . . that the statute does not incorporate a presumption in favor of dismissal with prejudice . . .; Third,

[13] This conduct shows a disrespect for a state court order as well as a disregard for the requirements of the Speedy Trial Act.

> Congress intended that prejudice to the defendant is required to be one of the factors bearing on whether the dismissal should be with or without prejudice . .; Fourth, and perhaps most important (the Act) does not bar reprosecution based on the consideration of only one factor, such as the effect that permitting reprosecution would have on encouraging compliance with the (Act) . . ." (P.B. p. 21-22)

Petitioner's reliance upon the legislative history is misplaced. Regarding Petitioner's first and third propositions, the legislative history is, at best, conflicting and inconclusive. There are passages equally in support for the dismissal with prejudice sanction:

> (For Example), "[n]either the House or Senate bills, from which the Act evolved, contained the present language which allows the Court to dismiss with or without prejudice after consideration of listed factors. The 1974 House subcommittee bill contained a bar to re-prosecution of those cases which had exceeded the speedy trial time limits. The Senate bill allowed reprosecution only 'if the court in which the original action was pending finds that the attorney for the government had presented compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided." *Misner, supra*, p. 296.)

By selectively citing to excerpts from legislative reports and debates, Petitioner offers a biased and unrepresentative view of the collective intent of Congress. Where the legislative history is uncertain and indefinite, one must return to the plain wording of the statute with even greater attention. *Ford Motor Credit Co.* v. *Cenance* 452 U.S. 155, 158 (1981); *United States* v. *Russo* 714 F. 2d 1264, 1266 (11th Cir. 1984).

As has been demonstrated, neither a requirement of prejudice to the defendant nor the notion that the dis-

missal without prejudice is a central feature of the Act is found in the language of the statute or its legislative history. In *U.S.* v. *Russo* (supra at 1266), the court observed that, "the language of the statute specifies the availability of both remedies. Therefore, without more, it is evident that neither dismissal sanction has priority . . .";*In Accord, United States* v. *Kramer* 827 F. 2d. 1174, 1176 (1987); *United States* v. *Caparella* 741 F. 2d 1264, 1266 (11th Cir. 1984).

Respondent agrees with Petitioner's fourth argument that § 3162 (a)(2) does not turn upon the consideration of only one factor. Nevertheless, as discussed above, the District Court considered all three of the enumerated factors in its decision to dismiss with prejudice. Respondent also concurs with Petitioner's second argument that there is no presumption in favor of dismissal with prejudice. More than anything, the Speedy Trial Act is the result of a lengthy and hard-fought compromise between proponents for and against the dismissal with prejudice sanction. With this idea in mind, Congress committed this determination to the broad discretion of the district courts:

> "The amount of discretion given to the courts appears to be at least as great as that implicit in the 'ends of justice' continuance provisions . . ." (43 *University of Chicago Law Review* 667, 704); "[w]e prefer to follow the thrust of the compromise reached in Congress and leave the discretionary decision on whether dismissal is with or without prejudice to the courts . . ." (*United States* v. *Caparella* 716 F. 2d 976, 980 [2nd Cir. 1983]) "the proper dismissal sanction to be imposed in each case is a matter left to the exercise of the sound discretion of the trial judge after consideration of the factors enumerated in the statute." (*United States* v. *Russo, supra*, 741 F. 2d at 1267). A reviewing court was "not delegated the role of decision maker under the Speedy Trial Act, but the District Court was." (*U.S.* v. *Kramer* 827 F.2d 1174, 1179 (8th Cir. 1987) (dissenting opinion.)

On page 28 of its brief, Petitioner attempts to summarize the core meaning of the factor, ". . . the impact of a reprosecution on the administration of the Act, and on the administration of justice." Petitioner posits that a reprosecution in this case would serve the didactic purpose of sending, ". . . a message to defendants that they will not profit from absconding." Petitioner has placed undue emphasis on this point. Respondent in no way profited from his flight. His flight merely triggered the application of § 3161(h)(3)(A), thereby excluding the entire period from his flight to his capture. Respondent gained no advantage in terms of exhausting Speedy Trial Act time limitations.

Closer to the central issue of the dismissal sanction is the "effect of reprosecution on the administration of the Speedy Trial Act." (P.B. p.31) As Petitioner concedes, "(c)omplete absolution is more likely than a dismissal without prejudice to lead to modification, in procedures that will assure more rapid pretrial processing." (Ibid.) One scholar has pointed out:

> "The impact of a reprosecution on the administration of this chapter and on the administration of justice, should not be read as centering attention on whether the court could handle one additional case. The factor should interpreted as asking whether the granting of a dismissal without prejudice will undermine the effectiveness of the Act to force the generally-recalcitrant participants in the Criminal Justice System to move ahead with deliberate speed." (Misner, supra p.302)[14]

[14] At most, the government's interest in administering justice is balanced by the competing interest in administering the Act, thus rendering the third factor neutral. (*United States* v. *Russo*, supra at 1267)

This critical factor was significant in the District Court's determination to dismiss with prejudice. The intended effect of the Court's carefully reasoned decision was to issue a directive to the government that a "lackadaisical" attitude and general lack of responsiveness to the call of the Speedy Trial Act, will no longer be tolerated. An affirmance by this Court will reinforce this principle.

Petitioner takes issue with the District Court's characterization of the government's "lackadaisical" conduct. (P.B. p. 32) Petitioner makes the claim that "that Speedy Trial Act principles applicable to the return of fugitive defendants were not settled, and there is no evidence that the marshal in the Northern District of California was aware of the Speedy Trial principle in this case at the time of Respondent's arrest and removal proceedings." (Ibid.) The implications of Petitioner's position are dangerous. All agencies of the government responsible for the delivery of the defendant must be charged with knowledge of the applicable law. If not, the government would ultimately be free from accountability for the action or inaction of its agencies. This result would have the effect of shielding the government from answering to the courts for Speedy Trial violations. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 634, (1961) (applying the doctrine of imputed knowledge.) In this case, the prosecuting attorney was charged with the affirmative duty to alert the marshals of the Speedy Trial problems. His failure to so alert the marshal does not excuse the government for allowing a violation of the Act. It is, in fact, the "lackadaisical behavior," the District Court condemned.

CONCLUSION

There is a mosaic of facts, circumstances, nuances, attitudes, and conclusions that presents itself before a

trial court. This picture loses much of its essential character when it takes the form of a "cold" appellate record. In this case, for example, the District Court evaluated the attitude of the prosecutor as to his duty to enforce the Act's time requirements. The District Court was sensitive to the prosecutor's failure to carry out any of his responsibilities under the Act. The Court noted that the prosecutor did nothing to assure that the marshals moved Respondent with dispatch. The prosecutor was notified of Respondent's arrest on February 5, 1985, and was kept informed of the events leading up to the disposition of this case. (E.R. 70). The District Court also noted the prosecutor's persistence in misreading the Act's provision, and apparent antipathy towards a post indictment fugitive's Speedy Trial rights. The prosecution never admitted that the government exceeded the time limitations. Only at the present stage of this Appeal does the government concede that it violated the Act's time requirements.

The District Court also knew that Respondent's co-defendant had received a three year sentence for the same offenses. This allowed the District Court, without demeaning the seriousness of the charges against Respondent, to ensure a more responsive attitude on the part of the United States Attorney. The District Court did this by dismissing the counts with prejudice and giving Respondent the maximum Five year sentence for the bail-jump offense. The District Court realized that the nature of the delays was of such character that it would reoccur, and that fact made it even more important to respond sternly.

Examining this District Court's decision in its entirety, we see that the Court was faced with a recalcitrant prosecutor who simply refused to accept the fact that the

Speedy Trial Act applies to post-indictment fugitives. The District Court, an experienced trial court, knew that it could substantially increase the Respondent's sentence by giving him, (which it did), the five year sentence. It could punish Respondent sufficiently and still preserve the integrity of the Speedy Trial Act. These considerations, among others, are not readily apparent from reviewing the appellate record. They are, practically speaking, an integral part of the day to day decisions of a trial court.

The trial court sits in the unique position to evaluate the circumstances surrounding a Speedy Trial violation, and the effect it will or may have on the Court's ability to administer the act. For this reason, and others, Congress placed broad discretion in the trial court to determine the appropriate remedy. Once a district court judge, who has followed the case and the parties from the beginning, reviews the enumerated factors as they apply to the particular case, and considers the entire, unique set of facts and competing considerations present in the case, it has properly exercised its discretion. The Court of Appeal recognized the unique vantage point of the trial court in making its decision after considering all these factors. The Court of Appeal's decision that the trial court properly exercised its discretion is correct and proper.

Respectfully submitted

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